Insights, News & Events

A CONTINGENCY PLAN FOR A CONTINGENT WORKFORCE: ENSURING WORKPLACE PROTECTIONS FOR STAFFING AGENCY WORKERS

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Industry Focus

PEO

Many companies engage staffing agencies to supply temporary, or even permanent, workers to support their operations. Such arrangements offer a variety of benefits, allowing employers to nimbly adjust the size of their workforce based on fluctuating business needs. However, if you rely on staffing agencies to supplement your workforce, a recent decision by a Texas federal judge serves as a warning that you cannot bury your head in the sand when it comes to the legal rights of contingent workers.

COMPANY CLAIMS TO BE IMMUNE FROM LIABILITY

S&B Industries, Inc. operates a cell phone repair and testing facility in Fort Worth, Texas. In March 2015, the Equal Employment Opportunity Commission (EEOC) filed a disability discrimination lawsuit against S&B, alleging that the company failed to hire two deaf applicants because of their disability and failed to provide them a reasonable accommodation during the application process.

S&B contended that the individuals did not apply for employment with the company, but instead with Staff Force, a staffing agency engaged by S&B to supply it with contingent workers. S&B argued that it could not

be considered the "employer" of the applicants for purposes of the Americans with Disabilities Act (ADA) and sought to have the case dismissed. It offered evidence that Staff Force had sole responsibility for hiring, managing, paying, and terminating its contingent workers.

COURT DISAGREES, CLEARS CASE FOR TRIAL

On December 8, 2016, the federal court rejected the company's defense. To evaluate whether S&B could be considered the applicants' prospective "employer" under the ADA, the court applied the "hybrid economic realities / common law control test." This legal standard considers several factors, including the company's right to hire, fire, supervise, and set the employee's work schedule, to determine whether it could be considered an employer. The test considers the "economic realities" of the relationship, such as whether the alleged employer paid the worker's wages, withheld taxes, and provided benefits. However, the most important element is whether the alleged employer has the *right to control* the employee's conduct.

The court determined that while the majority of the above factors may have supported S&B's position that it was not the applicants' "employer" or "joint employer," S&B's *right to control* the contingent workers was the most important factor. The court concluded that the EEOC offered sufficient evidence on that element, so the court allowed the EEOC's case to proceed to a jury trial.

WHAT CAN YOU LEARN FROM THIS CASE?

This case offers important lessons for companies that use staffing agencies to provide contingent labor. First, you should completely relinquish responsibility for the recruiting, hiring, and assignment process to the staffing agency. Educate the staffing agency on the position's job duties and qualification requirements, and

then let it do what you engaged it to do: recruit qualified workers to support your operations.

Of course, not every contingent worker will pan out, in which case you should simply notify the staffing agency that you wish to end the unsuccessful contingent worker's assignment at your company.

Second, to the extent feasible, you should delegate supervision of contingent workers to the staffing agency and its employees. In reality, this could be a significant challenge. Most worksites with a contingent workforce use these workers to fill rank-and-file roles on the production line, with company supervisors directly overseeing the work. By adding staffing agency supervisors to directly oversee the contingent workers, you might sufficiently change the dynamic of whether you have the right to control their conduct.

If this is not feasible, there are still ways to reduce the indicia of your right to control. You can refrain from directly scheduling, training, disciplining, or terminating the contingent workers, and give sole responsibility for those functions to the staffing agency.

Third, the case highlights the importance of cooperation between your company and the staffing agencies in employee relations matters. For example, if a disabled contingent worker makes a request for an accommodation to one of your supervisors, you cannot ignore the request and assume it's not your company's problem. Doing so could lead both your company and the staffing agency to be on the hook for a possible violation. Instead, your company should notify the staffing agency so it can engage the worker in the ADA-mandated interactive dialogue process, and you can then collaborate with the staffing agency about potential reasonable accommodations.

Harassment and discrimination complaints by contingent workers require similar cooperation. While you can certainly expect the staffing agency to take the lead on any investigation, both you and the staffing

agency could face exposure if the complaint goes unaddressed and the misconduct continues.

CONCLUSION

The EEOC has identified "workplace civil rights protections" for temporary workers as one of its strategic priorities for fiscal years 2017-2021, so one would expect the EEOC to continue to file similar enforcement actions in the coming years. To minimize your legal exposure to contingent workers, you must not only take steps to reduce the indicia of your control over them, but also diligently report any accommodation requests and workplace complaints to the staffing agency and then cooperate with them to resolve any issues raised by the contingent workers.

For more information, contact your Fisher Phillips attorney.